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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/748,737	12/30/2003	Freda E. Robinson	HC12U-US	2702

60723 7590 09/04/2007

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EXAMINER	
LANDAU, SHARMILA GOLLAMUDI	
ART UNIT	**PAPER NUMBER**
1616	

MAIL DATE	DELIVERY MODE
09/04/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/748,737	ROBINSON ET AL.	
	Examiner	Art Unit	
	Sharmila Gollamudi Landau	1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *15 June 2007*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *13-24* is/are pending in the application.

4a) Of the above claim(s) *1-12* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *13-24* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Receipt of Amendments and Remarks filed 6/15/07 is acknowledged. Claims 1-24 are pending in this application. Claims 13-24 are directed to the elected invention and claims 1-12 are withdrawn as being directed to a non-elected invention.

Claim Rejections - 35 USC § 112

The rejection of claims 16-17 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention s withdrawn in light of applicant's amendments field 6/15/07.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 13-16, 19-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Robinson et al (20030049212).

Robinson et al teach a skin care composition to treat skin and hair comprising silicone elastomers. Robinson teaches the use of "skin care products" includes powders, wipes, hair conditioners, skin treatment emulsions, and creams. See [0016]. The composition is utilized in various forms including rinse-off cleansing comprising such as shampoos. [0213].

Component (a), the silicone elastomer is utilized in the amount of 0.1-30% and preferably 2-10%. See [0075]. The silicone elastomer includes an organopolisiloxane and dimethocone/vinyl dimethicone crosspolymers. See [0087] and [0089].

The composition may be in form of an emulsion. The composition comprises component (d), water, in an amount of 0.1-95% water and may be in an emulsion form. See [0135] and [0135]. Preferably the aqueous phase is dispersed wherein the aqueous phase is in an amount of 20-90% and preferably 40-80%. [0155].

Component (b): The w/o emulsion comprises an emulsifier for dispersing the aqueous phase in an amount of 0.1-10% and has an HLB of less than 14 and preferably 4 to about 14. [0159]. The composition *preferably* contains the silicone emulsifier such as dimethicone copolyols. These silicone emulsifiers are typically organically modified organopolysiloxanes, including dimethicone copolyols. These materials are polydimethyl siloxanes, which have been modified to include polyether side chains such as polyethylene oxide chains, polypropylene oxide chains, mixtures of these chains, and polyether chains containing moieties derived from both ethylene oxide and propylene oxide. Note [0166] specifically. Other non-silicone containing emulsifiers including sugar esters, alkoxylated sugar esters and polyesters, alkoxylated derivatives of C1-C30 fatty acid esters, and polyglycerol esters of C1-C30 fatty acids. [0168]. If the composition is formulated as an o/w emulsions then a hydrophilic surfactant is used

preferably non-ionic surfactants are used including alkylene oxide esters of fatty acids. [0187]. Other surfactants ethoxylated esters include PEG-30 glyceryl cocoate, sucrose cocoate, alkoxylated sugar esters, polyglycerol esters of fatty acids, Polysorbate 85, Polysorbate 20, etc. [0187]-[0192]. Robinson teaches the hydrophilic surfactants may also be used in a combination and may further include cationic, amphoteric, and zwitterionic surfactant (component c) to provide the desired HLB. [0193]

Component (c): The preferred o/w emulsion comprises a structuring agent, which may also act as a surfactant such as stearic acid, palmitic acid, etc. [0182]-[0183]. Note these structuring agents read on additional surfactant. Robinson teaches the composition is used for cleansing and thus contains 5-10% detergent surfactant such as sodium lauryl sulfate (anionic surfactant. [0212].

Although Robinson does not exemplify a hair shampoo/conditioner composition with the claimed components, it would have been obvious to one of ordinary skill in the art at the time the invention was made to look to the guidance provided by Robinson et al and arrive at the instant invention. One would have been motivated to formulate the silicone elastomer composition into a shampoo or hair conditioner formulation since Robinson suggests this. Therefore, if one desired to formulate a composition to cleanse or treat the hair, one would have been motivated to formulate a hair conditioner or shampoo. Further, it should be noted that Robinson prefers the use of an ethoxylated ester. For instance, Robinson teaches preferably using silicone ester emulsifiers as the emulsifiers when formulation a w/o emulsion and using alkylene oxide esters of fatty acids when formulating an o/w emulsion.

Response to Arguments

Applicant argues that unlike the present invention requires a tacky solvent to ensure solubility, such as the emollient glycerin and the tacky solvent prevents the active ingredient from being insufficiently dissolved with would result in a gritty feel. Applicant argues that the high levels of tacky solvents in Robinson necessary to fully dissolve the desired levels of active ingredients, will leave a residue on the hair and that Robinson renders the hair with a dirty rather than clean feeling and teaches away from the present invention.

Applicant's arguments filed 6/15/07 have been fully considered but they are not persuasive. The examiner points out that the instant claim language, i.e. comprising, does not exclude Robinson's glycerin or tacky solvent. Furthermore, applicant's arguments without any comparative studies are deemed to be speculative in nature.

Applicant argues that the purpose of the silicone elastomers in Robinson is to reduce the tackiness/stickiness of the tacky solvent to maintain the good skin feel and so that the mixture of tacky solvent and the skin care active has a sensory tactile perception of greater than 4.5 and the resulting composition has a sensory tactile perception rating of less than 4.5. Applicant further argues that Robinson fails to teach or suggest use of a silicone elastomer to deter the build-up of sebum on the surface of the hair to keep hair cleaner for a longer period of time while maintaining a smooth feel and long-lasting conditioning effects. Further according to applicant, there is no suggestion or teaching in Robinson for use of silicone elastomers to absorb sebum and that one skilled in the art at the time of the invention faced with the issue of trying to deter the build-up of sebum, have looked to Robinson for a solution to the present problem.

These arguments are not persuasive since instant claims do not recite any requirements for the composition to have any specific sensory tactile perception ratings or any requirements for the absorption of sebum. Even arguendo, if the claims recited such a function (to deter sebum build up), the examiner points out that Robinson teaches the same silicone elastomer as the critical ingredient, applied to the same substrate, i.e. hair. Therefore, Robinson's composition would necessarily perform the same function as claimed. The fact that applicant found an inherent mechanism of the prior art does not distinguish the instant invention from the prior art. With regard to claim 24, it is noted that applicant has amended the claim to recite the silicone elastomer is in sebum absorbing amount, the examiner points out that Robinson teaches the elastomer in an amount of 0.1-30% and preferably 2-10%. The instant specification discloses on page 8 that the elastomer is used in an amount of 0.01-10% and therefore Robinson teaches the same effective amount.

Therefore, Robinson renders the instant invention obvious.

Claims 17-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Robinson et al (20030049212) in view of Hourihan et al (4704271).

The teachings of Robinson et al have been set forth above. Although, Robinson teaches nonionic surfactants that are suitable include polyglycerol esters of C1-C30 fatty acids (polyglyceryl-4-isostearate), Robinson does not teach the instantly claimed ester.

Hourihan while teaching a emulsion antiperspirant teaches suitable emulsifying agent include polyglyceryl-3-isostearate, polyglyceryl-4-isostearate, polyglyceryl-3-stearate, polyglyceryl-5-stearate, polyglyceryl-4-palmitate, polyglyceryl-6-palmitate, polyglyceryl-3-laurate (also known as triglycerol laurate), polyglyceryl-3-myristate, etc. column 3, lines 55-68.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Robinson et al and Hourihan et al and utilize the instant ethoxylated ester emulsifying agent. One would have been motivated to do so since Robinson suggests the use of polyglycerol esters of C1-C30 fatty acid as suitable as suitable emulsifying agents and Hourihan teaches the instant polyglyceryl-3-laurate and the prior art's polyglyceryl-4-isostearate function as emulsifying agents to stabilize the emulsion. Therefore it would have been obvious for a skilled artisan to utilize any emulsifying polyglycerol esters of C1-C30 fatty acid known in the art at the time the invention was made.

Response to Arguments

Applicant argues that the instant claims are directed to an HLB of 10 or above and Hourihan teaches a HLB value of 6-9 which teaches away from the instant invention. Applicant argues that Hourihan is directed to non-analogous art, i.e., an antiperspirant stick and not directed to hair care composition.

Applicant's arguments filed 6/15/07 have been fully considered but they are not persuasive. Firstly, the examiner points out that applicant has misinterpreted Hourihan. Hourihan does not teach that the polyglycerol esters have an HLB of 6-9, rather Hourihan teaches, "the emulsifying system should have a resultant HLB value of 6-9, inclusive". Meaning the combination of emulsifiers used in the composition must have a total net value of 6-9. The examiner points out that polyglycerol-3-laurate inherently has an HLB of 11 (note reference attached). This is an inherent property of the compound itself. The examiner further points out that Robinson teaches the use of emulsifiers with an HLB of 4-14. These emulsifiers include polyglycerol esters of C1-C30 fatty acid. Although Robinson does not specify the instant

polyglycerol ester species, Robinson teaches the genus. Therefore, a skilled artisan would have reasonably expected success in the combination.

With regard to applicant's argument that Hourihan is non-analogous art, the examiner points out that Hourihan is relied upon for the specific teachings of the instant polyglycerol ester species. Both Robinson and Hourihan teach polyglycerol esters of C1-30 fatty acids are emulsifying agents. Therefore, the function of an emulsifier is to emulsify and this function will remain the same, irrespective the type of cosmetic composition, i.e. a hair care composition versus antiperspirant stick. Further, the examiner points out that the both references are in the same field, i.e. cosmetic compositions. It is also noted that antiperspirant compositions are applied to the places where hair is present. Therefore, the requirement of the two-prong test is met, i.e. both references are directed to cosmetic compositions and both references are reasonably pertinent to the particular problem with which the applicant was concerned. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992).

Therefore, Robinson renders the instant invention obvious.

Conclusion

Claims 13-24 are rejected.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period

will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sharmila Gollamudi Landau whose telephone number is 571-272-0614. The examiner can normally be reached on M-F (8:00-5:30), alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Sharmila Gollamudi Landau
Primary Examiner
Art Unit 1616

8/27/07